

EMPLOYEE SELECTION--THE NEW REQUIREMENTS

 Program Evaluation Officer

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On September 25, 1978 there went into effect a regimen of procedural standards known as the "Uniform Guidelines on Employee Selection Procedures." The potential consequences these Guidelines hold for private employers, government contractors, employment agencies, state and local governments, and the Federal Government itself--including CIA--are enormous. They apply to any selection procedure used as a basis for any employment decision. Besides tests, such employment decisions "include...hiring, promotion, demotion...referral, retention..." and so on. Also included is selection for training or transfer under most circumstances. This comprehensiveness and attendant stringency has produced mixed reactions, ranging from the view of various civil rights groups that the Guidelines are "a tremendous improvement" over earlier versions to the complaints of employer representatives that they are "extremely onerous" and "beyond the understanding of a majority of employers."

What follows is a modest attempt to provide some background to the Guidelines and to summarize their major requirements.

Background

The new Uniform Guidelines are rooted in Title VII of the Civil Rights Act of 1964, specifically the Tower Amendment, which authorized the use of "any professionally developed ability test, provided that such test, its administration or action upon the results, is not designed, intended or used to discriminate..." At first

some employers contended that this allowed them to use any test developed by a professional so long as they did not intend to exclude women or minorities, even if such exclusion was a consequence of test use.

In 1966, the Equal Employment Opportunity Commission (EEOC) adopted the first set of guidelines to advise employers that their intent was irrelevant: if a test or other practice had an adverse impact on women and minorities, it was unlawful unless it could be justified; that is, the employer would have to show that it fairly measured or predicted performance on the job. In succeeding years, the EEOC, as well as the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), elaborated on these guidelines and in 1970 expanded their application to include all selection procedures.

Then, in 1971, in Griggs v. Duke Power Company, the Supreme Court announced the principle that employer practices that had an adverse impact on minorities and that were not justified by business necessity constituted illegal discrimination under Title VII. The next year Congress confirmed this interpretation in its amendments to Title VII, also called the Equal Employment Opportunity Act. By this time, the EEOC, OFCCP and the Civil Service Commission (CSC) all had their own set of selection guidelines and had received much criticism for the different and sometimes contradictory standards.

Congress recognized the absurdity, and the 1972 Act created the Equal Employment Opportunity Coordinating Council (EEOCC), whose membership consisted of the CSC, EEOC, OFCCP, Civil Rights Commission and Department of Justice. The first major effort of the Council was to prepare a set of uniform guidelines on employee selection procedures to standardize the position of the various agencies. Over the next few years, the Council produced a seemingly endless procession of drafts and proposals, but it failed to realize its major objective.

Finally, in November 1976, three of the five members of the Council — the OFCCP, CSC and Justice — issued a new set of guidelines known as the "Federal Executive Agency Guidelines on Employee Selection Procedures" (or FEA Guidelines). The EEOC, which together with the Civil Rights Commission refused to endorse the new guidelines, then reissued its own 1970 selection guidelines.

This situation continued until 1977 when, with the advent of the Carter administration, efforts were intensified to produce a unified government position. Eventually an agreement was achieved, and on December 30, 1977 a new proposal on uniform guidelines was published in the Federal Register.

A public hearing was held in April 1978, certain changes based on comments received were subsequently made, but the new Uniform Guidelines stayed essentially intact. They were issued in final form in August, 1978 and now supercede both the 1970 EEOC and 1976 EEA guidelines.

Current Status

The new Uniform Guidelines represent a compromise between the two previous sets. Unchanged, however, is the fundamental principle underlying all guidelines since 1966: employer policies or practices having an adverse impact on employment opportunities of any race, sex or ethnic group are illegal unless justified by business necessity. Normally, "by business necessity" means by validation which demonstrates the relation between the selection procedure and performance on the job. A selection procedure that has no adverse impact generally does not violate Title VII; that is, an employer may usually avoid the application of the Guidelines by using selection procedures that have no adverse impact. (For the "rule of thumb" adopted by the Guidelines as a practical means of determining adverse impact, see Newsbriefs, April 1978.)

The Guidelines require that the employer (read "the Agency") maintain and have available for

inspection records or other information that disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by sex and five specified race and ethnic classification groups. (If there are large numbers involved, the information may be based on appropriate samples.) If the employer does not maintain this information, the enforcement agencies may draw an inference of adverse impact, determine whether a protected group is underutilized in a job category, and require validation of the selection procedures.

Employers will be judged in the overall results of their selection process, or against what is viewed as the "bottom line" concept. If the information required shows that the total selection process does not have an adverse impact, the employer under most circumstances will not have to evaluate the individual components of the selection process for adverse impact. If on the other hand this information does show that the total selection process for a particular job or group of jobs has adverse impact, the individual components of that process must consequently be evaluated for adverse impact.

Once the employer has established adverse impact, it can do one of two things: modify or eliminate the procedure producing the adverse impact, or justify the use of the procedure on grounds of "business necessity." This latter step ordinarily means that the employer must show a clear relation between performance on the selection procedure and performance on the job. In the language of industrial psychology, the employer must validate the selection procedure. For this reason the bulk of the guidelines, indeed the most technical and controversial sections, consists of the Government's interpretation of standards for validation.

Summary

It took nearly six years for the Federal Government to agree on one uniform set of guidelines by which employers' selection practices will be evaluated. Those

guidelines now exist, but some believe it may take another six years of litigation before the meaning of the guidelines is clarified. Meanwhile, employers are subject to their provisions, the agencies will be enforcing them, and it is crucial that everyone involved in the process of employee selection understand them. While there are some specifics of the selection process that may be uncertain as far as the law is concerned, there are several basic issues that have been resolved, and these issues do provide a framework for employee selection within the law. It is now clear that an employer must:

1. Determine whether the selection process overall results in adverse impact on the employment of any group protected under the law.
2. Where there is adverse impact, ascertain what specific step or technique used in the selection process is contributing to the adverse impact.
3. Demonstrate that the selection technique resulting in adverse impact is job-related and thus complies with the requirement of "business necessity." The proof must be in the form of acceptable evidence of validity.

(Another issue of Newsbriefs will contain an article discussing the validation requirements of the new Uniform Guidelines.)